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No. 02-271

IN THE

Supreme Court of the United States

DOW CHEMICAL COMPANY, MONSANTO COMPANY, *et al.*,
Petitioners,

v.

DANIEL RAYMOND STEPHENSON, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN INSURANCE ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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CONSENT OF PARTIES

Petitioners and respondents have consented to the filing of this brief, and their letters of consent have been lodged with the Court.*

INTEREST OF *AMICI*

The American Insurance Association (AIA), founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing over 410 companies writing property and casualty insurance in every state and jurisdiction of the United States. The purposes of AIA are to promote the economic, legislative, and public standing of its members; to provide a forum for discussion of policy problems of common concern to its members and the insurance industry; to keep members informed of regulatory and legislative developments; and to serve the public interest through appropriate activities including the promotion of safety and security of persons and property. AIA is headquartered in Washington, D.C., maintains six regional offices, and retains legislative counsel in every state. Among its other activities, AIA files *amicus* briefs in important cases before state and federal courts that further its purposes.

The National Association of Manufacturers (NAM) — 18 million people who make things in America — is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

The Chamber of Commerce of the United States (the Chamber) is the world's largest business federation representing an underlying membership of more that

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* Counsel for the *amici* were the sole authors of this brief. No person or entity other than *amici* or their members made a financial contribution to the preparation or submission of this brief.

3,000,000 businesses of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

Amici's respective members thus include many of the major industries, businesses and insurers in this nation. Many of *amici*'s respective members thus have in the past been or may in the future be named as defendants in class action litigation. And many either (i) have already entered into and/or been called upon to fund class action settlements; or (ii) will be required to determine whether to do so in the future.

Accordingly, the question presented in this case is of critical importance to *amici*. Class action settlements generally do not require defendants to pay over the settlement funds until the settlement receives final judicial approval on direct review. Once it receives that approval, however, defendants or insurers are required finally to pay over those funds. In return for doing so, defendants typically receive a release to be binding on all class members who had not previously exercised a right to opt out. These defendants and insurers thus have a strong interest in the continued finality of class settlements, lest they be put in the position of having paid what are frequently large amounts of money to the class only to become exposed to renewed litigation years later by members of the class itself.

For this reason, the Second Circuit's decision in this case — which, as detailed below, marks a radical expansion of class members' ability to undo the binding effect of final class settlements through collateral attacks mounted years after the settlement funds had been paid out — is of grave

concern to *amici*. In the years after a class settlement is negotiated and receives final judicial approval, it is hardly unusual for there to be factual or legal developments that cause class members, though affected equally by the settlement at the time it was entered, to derive unequal benefit from it in retrospect. If defendants and insurers cannot rely on the settlement's continued finality in such circumstances, it would be difficult, if not impossible, for them ever to agree to settle major class litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below purports to undo the binding effect of the landmark Agent Orange settlement a full 15 years after that settlement received final judicial approval and petitioners paid $180 million to class members in reliance upon its finality. The decision does so without even acknowledging, much less affording any weight to, petitioners' obviously substantial reliance interest in the settlement's continuing finality. And it does so without affording any weight to the multiple prior judicial determinations (including two such determinations by the Second Circuit itself) that all Agent Orange class members — including those, such as respondents here, who had been exposed to Agent Orange but did not have any manifest disease as of the time of the settlement — were adequately represented.

Instead of paying any heed to the reliance and finality interests at stake when a long-final settlement is subject to collateral attack, the Second Circuit simply equated collateral attack on a final settlement with direct review of a *non*-final settlement under which no performance has taken place. The sum and substance of the opinion below was thus as follows: because this Court's decisions in "*Amchem* and *Ortiz*" — each of which involved direct review of non-final settlements — "suggest" that respondents may not have been adequately represented "in the prior Agent Orange litigation," respondents can necessarily evade the Agent Orange

settlement on a collateral attack. Pet. App. 19a. In other words, the court below apparently assumed that any claim of inadequate representation that might lead to a settlement being disapproved on direct review supplies equal grounds for re-opening that settlement years later on collateral attack.

Worse still, the decision below suggests that, on such a collateral attack, adequacy of representation is to be assessed *in retrospect*, in light of subsequent factual developments that were not known and could not have been predicted at the time the settlement was entered and became final. In this case, for example, the Second Circuit did not identify any conflict of interest between respondents and the remainder of the class that existed at the time the settlement was negotiated and approved in the 1980s. To the contrary, the court below reaffirmed its two prior rulings that all class members who were asymptomatic at the time of the settlement *were* adequately represented — but the decision below now excepts from those rulings class members whose illnesses, as matters *subsequently* developed, happened to become manifest after 1994. Pet. App. 13a & 19a n.7. It obviously could not have been known at the time of settlement that respondents here, as opposed to any of the other then-asymptomatic class members, would not develop symptoms until after 1994: at the time of its negotiation and approval, the settlement thus affected all asymptomatic class members identically. Yet the court below nonetheless allowed respondents to evade the settlement's binding effect because — viewed in a decade and a half of hindsight — it turns out that respondents' medical conditions developed in a way that has allegedly resulted in their deriving less benefit from the settlement than certain other class members whose medical conditions developed differently.

Amici respectfully submit that this radical expansion of collateral attacks on final settlements cannot be sustained. As shown below, the Second Circuit's decision cannot be squared with settled principles regarding the availability and

scope of collateral attacks on final settlements and the sharp distinction between collateral attack and direct review. Moreover, the decision threatens to make it difficult, if not impossible, for defendants and insurers ever to settle major class litigation. In the years after a class settlement is negotiated and receives final judicial approval, it is hardly unusual for there to be factual or legal developments that cause class members, though affected equally by the settlement at the time it was entered, to derive unequal benefit from it in retrospect. If defendants and insurers cannot rely on the settlement's finality in such circumstances — if class settlements are to be a one-way street under which defendants and insurers are to pay what frequently are massive settlement amounts, but absent class members remain free thereafter collaterally to attack the settlement as if the direct-review determination of adequate representation never took place — it would be difficult to see how defendants and insurers could ever justify a decision to settle in the first place.

ARGUMENT

THE DECISION BELOW ERRONEOUSLY EQUATES THE STANDARDS FOR COLLATERAL ATTACKS ON FINAL SETTLEMENTS WITH THOSE FOR DIRECT REVIEW OF NON-FINAL SETTLEMENTS.

Amici fully agree with and join in petitioners' argument that, where a class settlement received final judicial approval on direct review and the class received the procedural protections of Rule 23, principles of *res judicata* preclude absent class members from thereafter collaterally attacking the settlement on grounds of alleged inadequate representation. Where Rule 23's panoply of procedural protections were observed — including the requirement that the courts on direct review determine that all class members were adequately represented — the application of *res judicata* is fully consistent with the requirements of due process:

as the Ninth Circuit put it, "due process does not require collateral second-guessing of those determinations and that review." *Epstein* v. *MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999).

Rather than repeat that argument at length, however, *amici* will focus instead on an additional fundamental defect in the Second Circuit's decision. Even if a collateral attack based on alleged inadequate representation could be mounted here in theory notwithstanding the principles of *res judicata*, the court below applied an entirely wrong standard in assessing that attack. Without any analysis — and certainly without any evident recognition of the very different interests at stake — the Second Circuit simply assumed that the standards for considering adequacy of representation on a collateral attack are identical to those for considering the issue on direct review: the linchpin of its decision is thus that any representation issues that might have led to disapproval of a non-final settlement on direct review under this Court's direct-review decisions in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997), and *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999), automatically and equally supply grounds for the re-opening of a final settlement on collateral attack. Pet. App. 19a.

As shown below, this equation of direct review and collateral attack is supported by neither precedent nor reason. The law is settled that collateral attacks are limited to circumstances where enforcement of a final settlement would cause a deprivation of procedural due process. *See* Section A, *infra*. The Second Circuit's assumption that *Amchem* and *Ortiz* set forth the requirements of due process fails to recognize, in the first place, that those decisions are non-constitutional rulings based on the prophylactic requirements of Rule 23 rather than due process. *See* Section B.1, *infra*. In any event, even if those decisions did set forth due process requirements as applied to *direct* review, this Court has

consistently admonished that the requirements of procedural due process are a balance of *all* competing interests. That balance is very different as applied to the re-opening of a final settlement than to the direct review of a non-final one. Accordingly, even if — notwithstanding observance of the procedural protections of Rule 23 — collateral attacks based on alleged inadequate representation are not necessarily precluded by *res judicata*, such attacks would have to be subject to a far more restrictive standard and be based upon a far more egregious level of inadequate representation than are adequacy-based objections on direct review. *See* Section B.2, *infra*. And viewed against this correct, more restrictive standard, respondents' claim falls well short of the level of egregiously inadequate representation that would be necessary to support a collateral attack. *See* Section C, *infra*.

A. A final settlement can be re-opened on collateral attack only where failure to do so would violate due process.

It is well-settled that the binding effect of a final class settlement cannot be avoided on collateral attack on the basis of any alleged error that might have led to the settlement's disapproval on direct review. To the contrary, this Court has made clear that a class member bound by such a settlement may collaterally attack the settlement only where a failure to re-open the settlement would cause a deprivation of procedural due process.

For example, in *Hansberry* v. *Lee*, 311 U.S. 32, 40-43 (1940), this Court held that absent class members are bound by the outcome of class proceedings unless the ordinary application of *res judicata* would work "a failure of due process." Moreover, *Hansberry* went on to equate collateral attack on a final class resolution with a challenge to full faith and credit (*id.* at 43) — and it is settled law that a judgment "need do no more than satisfy the minimum procedural requirements of the . . . Due Process Clause in order to qualify

for [] full faith and credit." *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982). *See also Silber* v. *Mabon*, 957 F.2d 697, 700 (9th Cir. 1992) (class member's "only hope of success" in seeking collaterally to attack a class settlement on grounds of inadequate notice "would be to establish that the notice procedure deprived him of the procedural due process required by the Fourteenth Amendment").

B. The court below erred in assuming that failure to re-open a final settlement on collateral attack violates due process any time a representation issue might have led to the settlement's disapproval on direct review under *Amchem* and *Ortiz*.

Although the Second Circuit initially paid lip service to this requirement that a putative collateral litigant show that failure to re-open the settlement would work a deprivation of procedural due process (Pet. App. 18a), it offered no explanation why the adequacy-of-representation contention raised by respondents here rose to that level. Instead, the court seems simply to have assumed that the adequacy-of-representation holdings of *Amchem* and *Ortiz* governing direct review are identical to the due process standard governing collateral attacks. That assumption was wrong.

1. *Amchem* and *Ortiz* are not constitutional rulings.

To begin with, nothing in *Amchem* or *Ortiz* suggests that their adequacy-of-representation holdings are based on due process rather than on the prophylactic adequacy protections of Rule 23(a)(4) of the Federal Rules. To the contrary, in each case the Court was careful to describe its holding that the class was not adequately represented as an application of Rule 23. In *Amchem*, the Court thus emphasized that its opinion "focus[es] on the requirements of Rule 23" and specifically described its adequacy-of-representation conclusion as being that the class does not "satisfy Rule 23(a)(4)'s requirement that the named parties 'will fairly and adequately protect the interests of the class.'" 521 U.S. at

622 & n.17, 625. And in *Ortiz*, the Court confined its adequacy holding to "the requirements of structural protection applicable to all class actions under Rule 23(a)(4)" and the "subdivisions of Rule 23(b)." 527 U.S. at 856-57 & n.31; *see also id.* at 865 (Rehnquist, C.J., concurring) (confirming that the Court's opinion is rooted in "the Federal Rules of Civil Procedure"). Indeed, the words "due process" appear nowhere in the section of either opinion containing the Court's holdings that the classes were not adequately represented. *See Amchem*, 521 U.S. at 625-28; *Ortiz*, 527 U.S. at 854-59.*

Nor is it unusual for the Federal Rules of Civil Procedure to supply prophylactic protection that is broader than the due process minimum. For example, in the closely related context of notice in class actions, the requirements of Rule 23 have been recognized to provide more protection than constitutionally required. As summarized by the Newberg treatise:

> [D]ue process sets only minimum standards of conduct. . . . The necessary converse of the Advisory Committee's avoidance of hard analysis of the due process precedent was its promulgation

* It would appear that this limitation of the adequacy holdings to the provisions of the Federal Rules was quite deliberate. (1) In *Ortiz*, three of the seven members of the majority wrote separately to state that they agreed with the majority's holding based on the "Federal Rules" as they presently exist, but that they would "agree entirely with th[e] dissent" if those rules were "revised" — thereby confirming that the decision is *not* a constitutional one. 527 U.S. at 865 (Rehnquist, C.J., joined by Scalia and Kennedy, JJ., concurring). (2) In both *Amchem* and *Ortiz*, the Court called for Congress to create a "national asbestos dispute-resolution scheme" that would benefit present and future claimants. *See* 521 U.S. at 598, 622; 527 U.S. at 821 & n.1. Yet Congress's flexibility in doing so could clearly be hamstrung if the distinction drawn in those cases between presently injured and exposure-only claimants were elevated to constitutional dimensions.

> of notice language more stringent than due process requires. Of even more long-range significance, however, are the Supreme Court's intimations, in *Eisen* v. *Carlisle & Jacquelin* [417 U.S. 156 (1974)], that the phrasing of Rule 23(c)(2) may, at least in some respects, be even more demanding than application of the *Mullane* line of cases would suggest.

2 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 8.04, at 8-15 (1992). Likewise, whereas Rules 4(e) and 4(k) generally permit federal district courts to exercise personal jurisdiction only over those defendants that have minimum contacts with the State in which the district court is located, due process in fact permits federal district courts to exercise personal jurisdiction over defendants nationwide. *See, e.g., Robertson* v. *Railroad Labor Bd.*, 268 U.S. 619 (1925); *see also Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 466-67 (2000) (observing that Rule 15 is not "itself a constitutional requirement," although holding that the particular violation of Rule 15 in that case was also a violation of due process).

The threshold flaw in the Second Circuit's decision is thus that *Amchem* and *Ortiz* are *non*-constitutional rulings the claimed violation of which cannot, without more, support a collateral attack on a final class settlement.

2. Even if *Amchem* and *Ortiz* did state the requirements of due process with respect to direct review, the threshold for a due process violation is far higher on collateral attack.

Even if the Court were to hold that the Rule 23 and due process adequacy-of-representation standards are equivalent as applied to direct review — and thus that *Amchem* and *Ortiz* specify due process requirements applicable on direct review of federal and state class actions — it would by no means follow that the due process standard would be the *same* as

applied to collateral attacks. Quite the opposite: the Court's procedural due process cases dictate that inadequate representation must be far more egregious to support a collateral attack on a final class settlement than to warrant due-process-based disapproval of a non-final settlement on direct review. *Cf. Brecht* v. *Abrahamson*, 507 U.S. 619, 633-35 (1993) (in the context of review of criminal convictions, the Court has "recogniz[ed] the distinction between direct and collateral review" and "applied different standards on habeas than would be applied on direct review," including a "less onerous standard" for "review of constitutional error").*

As the Court has made clear, at least where (as here) there is no historical tradition involved, "due process is flexible and calls for such procedural protections as *the particular situation demands*." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972) (emphasis added). The Court has thus instructed that, in determining whether a claimed deficiency rises to the level of a deprivation of procedural due process, the courts are to balance all relevant interests implicated by the particular context. Accordingly, the familiar test of *Mathews* v. *Eldridge* balances:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the

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* Thus, in the habeas context — where life, death or lengthy incarceration is at stake — this Court has regularly held that constitutional errors in criminal trials that would have led to a reversal of a conviction on direct review do not rise to the level of constitutional error necessary to permit reversal on collateral review. *See, e.g., Brecht*, 507 U.S. at 634-37 (the "finality" interest underlying the "distin[ction] between direct and collateral review" warrants "applying a less onerous standard on habeas review of constitutional error"; citing cases); *Stone* v. *Powell*, 428 U.S. 465, 489-96 (1976) (violations of Fourth Amendment exclusionary rule ordinarily not cognizable on habeas review); *Wright* v. *West*, 505 U.S. 277, 286-88 & n.3 (1992) (opinion of Thomas, J.) (citing cases).

> procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335 (1976). Where, as here, the issue involves "disputes between private parties rather than between an individual and the government," the third *Mathews* factor is modified so that "principal attention" is paid to the interests of other affected private parties "with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or foregoing the added burden of providing greater protection." *Connecticut* v. *Doehr*, 501 U.S. 1, 11 (1991).*

The relevant interests — and hence the *Mathews* balance — are very different in the context of a collateral attack seeking to re-open a settlement years after it became final and the defendants paid out the settlement funds than in the context of direct review of a non-final settlement. We will address the *Mathews* factors in reverse order.

a. The interests represented by the third *Mathews* factor — which as applied here include the reliance and finality interests of defendants, as well as the finality interest of the judicial system — support a much higher threshold for due process violation on collateral attack than on direct review. These interests are obviously impacted to an immensely greater degree where a final settlement is sought to be

* Although the *Mathews* test was originally developed in the context of challenges to procedures afforded in connection with administrative action, the Court has since expanded its application into "a general approach for testing challenged . . . procedures under a due process claim," *Parham* v. *J.R.*, 442 U.S. 584, 599 (1979), and has applied it in a variety of private civil litigation contexts. *See, e.g., Doehr*, 501 U.S. 1 (private use of civil attachment procedure).

re-opened than where a non-final settlement, under which no party has performed, is on direct review.

The settlement at issue here, like class-action settlements generally, did not require petitioners to pay over the settlement funds until the settlement received final judicial approval on direct review. Once it received that approval, however, petitioners were required to pay the $180 million in settlement funds, in return for which they were entitled to a release to be binding on all class members (such as respondents) who had not previously opted out. The settlement funds, of course, are long gone and cannot be retrieved. Petitioners thus have an overwhelming reliance interest at stake in the continued finality of the settlement, lest they be put in the position of having paid a massive amount of money to the class only to become exposed to renewed litigation years later by members of the class itself.

Moreover, the judicial system expended enormous resources over almost two decades in bringing the massive Agent Orange litigation to conclusion through the class settlement and in administering the settlement after it became final. The judicial system's interest in finality is thus at its highest with respect to attempts to re-open that litigation and undo the settlement on collateral attack. In fact, the Second Circuit itself expressly so recognized in rejecting a prior adequacy-of-representation-based collateral attack on this settlement, determining that "society's interest in the efficient and fair resolution of large-scale litigation outweighs the gains from [the additional protection sought], whose benefits here are conjectural at best." *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1435 (2d Cir. 1993).

The law fully recognizes the strength and legitimacy of these reliance and finality interests in avoiding collateral relitigation of ostensibly final judgments. For example, the entire purpose of "res judicata and collateral estoppel [is to] . . . encourage reliance" on matters as they have already been

adjudicated (*Allen* v. *McCurry*, 449 U.S. 90, 94 (1980)), and to further the courts' interest in "the conclusive resolution of disputes within their jurisdiction." *Kremer*, 456 U.S. at 466 n.6. Likewise, much of this Court's habeas jurisprudence is predicated on a recognition that "[t]he strong interest in preserving the finality of judgments . . . must be overcome before collateral relief can be justified." *Henderson* v. *Kibbe*, 431 U.S. 145, 154 n.13 (1977); *see also Brecht*, 507 U.S. at 635.

b. The second *Mathews* factor — focusing on the "risk of an erroneous deprivation" and the "probable value" of the additional procedural rights being sought — also warrants a far higher threshold for due process violation on collateral attack. Before any collateral attack to a final settlement approved pursuant to Rule 23 can ever be mounted, class members will have had full opportunity to raise adequacy-based objections on direct review and the courts will have determined on that review that the class was adequately represented. The risk of an erroneous deprivation — the risk that the class was not adequately represented — is clearly at its low end in such circumstances, where the contrary has already been determined by the courts on direct review. Certainly the risk is far lower than in the context of direct review, where adequacy of representation has yet to be passed upon.

For similar reasons, the Court has frequently recognized in analogous contexts that, where collateral review is sought of issues previously determined on direct review, the threshold for constitutional error is far higher than it was on direct review. This Court's habeas cases thus regularly state that "[w]hen the process of direct review — which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari — comes to an end, a presumption of finality and legality attaches to the conviction and sentence." *Brecht*, 507 U.S. at 633; *Barefoot* v. *Estelle*, 463 U.S. 880, 887 (1983). Accordingly, this Court has "appl[ied] a less

onerous standard on habeas review of constitutional error," rejecting an array of collateral challenges that raise constitutional errors that would have led to reversal on direct review. *Brecht*, 507 U.S. at 637; *see* p. 11n, *supra*. Indeed, even in capital cases, once a conviction has been sustained on direct review the defendant is stripped of the presumption of innocence and faces "extraordinarily high" barriers to any attempt on collateral review to seek reversal of the death sentence on grounds of "actual innocence." *Herrera* v. *Collins*, 506 U.S. 390, 398-400, 417 (1993).

The same principle underlies the full faith and credit cases. Defendants ordinarily have the right to resist the application of full faith and credit where the judgment is the product of a procedural due process violation or the rendering court lacked jurisdiction. However, where the due process or jurisdictional question was actually determined by the rendering court, the question is generally *not* subject to collateral relitigation. Instead, "the general rule [is] that a judgment is entitled to full faith and credit — even as to questions of jurisdiction — when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." *Durfee* v. *Duke*, 375 U.S. 106, 111 (1963).*

Moreover, the insight of these cases — that the risk of error and the probable value of further proceedings is lower where the pertinent issue has already been determined on direct review — applies with particular force to the Agent Orange settlement. In the course of direct review and the prior attempted collateral attack, the district court and the

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* *See also Rosen* v. *National Labor Relations Bd.*, 735 F.2d 564, 571 (D.D.C. 1984) (administrative adjudication not subject to collateral challenge even where the person aggrieved was not a party to the adjudication and only had "virtual or proxy representation" because "the likelihood that a further collateral hearing will reduce the risk of erroneously adverse judicial [finding] is quite small").

Second Circuit did not just find that the class was adequately represented in general. Instead, they expressly considered and rejected claims of inadequate representation that (i) were very similar to the claim raised by respondents here, and (ii) were brought by absent class members who at the time were situated identically to respondents. On direct review, objectors who — like respondents — were asymptomatic at that time argued that they had not been adequately represented. And on the prior attempted collateral attack, class members who were asymptomatic at the time of the settlement but developed symptoms thereafter maintained — much like respondents — that they were not adequately represented in the absence of the "designation of a subclass of future claimants." *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d at 1436-37. The Second Circuit determined otherwise. *Id.*; *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 167 (2d Cir. 1987). Where the courts have assessed — and rejected — virtually the identical claim of inadequate representation now being raised, the "risk of an erroneous deprivation" and the "probable value" of re-opening the final settlement are all the more miniscule.*

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* To the extent the Second Circuit's elaborate attempt to distinguish its prior decisions (Pet. App. 13a) was an attempt to address this point, the effort is wide of the mark. Our point here is that the risk that the class was not adequately represented is at its lowest when the courts previously considered a very similar claim of inadequate representation to that now being made — whether or not the prior claim can, if read in the most parsimonious possible manner, be distinguished from the current one.

In any event, the Second Circuit's attempt to distinguish the prior adequacy claims from that now being raised by respondents fails on its own terms. The asymptomatic objectors on direct review were in exactly the same situation at that time as were respondents: each of them had been exposed to Agent Orange, had no present symptoms and had no way of knowing whether their symptoms would first appear after 1994. Their challenge to inclusion within the same

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c. As to the first *Mathews* factor, respondents no doubt have an "interest" in being able to undo the settlement's binding effect — although *amici* would seriously question the strength of that "interest" in view of the Second Circuit's repeated conclusions that the tort claims of Agent Orange plaintiffs are "speculative" and have a "dim prospect of success" on the merits. *In re Agent Orange*, 996 F.2d at 1437. For a number of reasons, however, that interest — whatever its strength may be in general — is far less weighty in the context of collateral attack on a final settlement than in the context of direct review.

First: As the Court has recognized, "[d]irect review is the principal avenue for challenging a [judgment]." *Brecht*, 507 U.S. at 633. Here, respondents had full opportunity to object to the settlement on direct review — indeed, the settlement's provisions regarding class members whose illnesses would first develop after 1994 were clear at the time of direct review and were in fact highlighted by the district court at that time. *See* Pet. App. 5a. Having bypassed the opportunity to object on direct review, respondents' "interest" in being able to launch a collateral attack years later should be assigned considerably less weight in the due process balance. This is particularly true given that respondents' "interest" in voiding the settlement was fully represented on direct review by other class members who did object, who were situated identically to respondents at the time they did so, and who raised very similar arguments to those that respondents now put forth. *See* pp. 15-16, *supra*.

(Cont'd)
class as those with then-manifest injuries thus fully embraced and represented respondents' position here. Indeed, if the Second Circuit were correct that *Amchem* and *Ortiz* "indicate" that the class should have been divided into subclasses of "present and future claimants" (Pet. App. 19a), respondents would have been assigned to the *same subclass* as both these asymptomatic objectors and the class members who brought the prior collateral attack.

Second: The particular grounds on which respondents base their inadequate-representation claim renders their "interest" in being able to re-open the settlement even less cognizable. Respondents do not allege that the settlement disadvantaged them on the basis of any fact that was known or predictable at the time the settlement was negotiated and approved. To the contrary, it obviously could not have been known or predicted *which* class members — whether respondents or anyone else — would first develop symptoms after 1994. As of the time it was entered, the settlement thus affected all asymptomatic class members identically.

Instead, respondents argue that they were not adequately represented because — as matters *subsequently* developed — it turned out that their illnesses happened to become manifest after 1994. In essence, respondents are alleging "inadequate representation by hindsight": that, although they and other class members were affected equally by the settlement at the time it was entered, subsequent factual developments have caused them to derive allegedly unequal treatment in retrospect. With the benefit of hindsight, class members disgruntled by the share of settlement funds which they are ultimately eligible to collect can almost always fashion arguments along these lines. Accordingly, if such arguments were sufficient to cause the re-opening of final class settlements — depriving defendants of the benefit of their bargain and exposing them to renewed litigation long after they have paid out the settlement funds — it will be for the most part impossible for defendants to settle class actions in the first place. Unless that is to be the case, class members' "interest" in re-opening a settlement based on "hindsight" arguments of this nature must be given very little weight.

C. Respondents cannot show the egregious level of inadequate representation that would be necessary to support a collateral attack.

For the foregoing reasons, collateral attacks based on inadequate representation — to the extent they are not generally barred by *res judicata* — must be limited to cases in which the representation was egregiously inadequate or the requisite due process protections were not afforded on direct review.

Hansberry v. *Lee*, the sole case in which this Court has permitted a collateral attack on a final class resolution, illustrates such a case. There, a state court had entered a class-action judgment (i) finding that a restrictive racial covenant had been executed by the necessary percentage of landowners in the area in question and (ii) holding that all members of the class were bound by the restrictive covenant. 311 U.S. at 39. The purported "class" comprised persons whose interests were directly at odds concerning the very subject matter of the litigation: it included both landowners who "sought to secure [the covenant's] benefits by enforcing it" and landowners who wished to "challenge the validity of the [covenant] and resist[] its performance." *Id.* at 44. The class judgment, moreover, was procured only by means of "a false and fraudulent stipulation" that the necessary percentage of landowners had executed the covenant. *Id.* at 38. Finally, the state courts on direct review made no determination regarding — and do not appear even to have addressed — adequacy of representation.* In such circumstances, this Court held that class members who wished to challenge the covenant had not been adequately

* *See* Marcel Kahan & Linda Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 Sup. Ct. Rev. 219, 266 (1996) (the state court in the initial action in *Hansberry* "made no finding on the adequacy of representation").

represented by class members who wanted to see the covenant enforced, and that due process required re-opening of the judgment on collateral attack. 311 U.S. at 44-45.

But there is obviously a world of difference between the collateral attack permitted in *Hansberry* and that brought by respondents here.

- Unlike in *Hansberry*, the Agent Orange class members did not have conflicting interests regarding the very subject matter of the litigation: all had exposure to Agent Orange; all had resulting tort claims against the product's manufacturers; and all therefore had a common interest in maximizing the recovery from the defendants. Instead, as discussed above, respondents' claim to have been inadequately represented is simply a hindsight-based complaint that subsequent developments have led the settlement to be less favorable to them than may have appeared at the time the settlement was entered.
- Unlike in *Hansberry*, the final judgment arose — not from a fraudulent stipulation — but from a good-faith settlement that the courts approved as fair and pursuant to which petitioners paid $180 million to the class in legitimate reliance upon the settlement's binding effect.
- Unlike in *Hansberry*, class members received the full panoply of procedural protections under Rule 23, including the courts' careful determination on direct review (and indeed, on the prior collateral attack) that the class was adequately represented.

In short, in *Hansberry*, (i) the class comprised persons whom one would more expect to find on the *opposite* sides of litigation rather than jointly represented within the same class; (ii) the class judgment was procured by fraud, leaving its proponents with no legitimate reliance interest in its enforcement; and (iii) the class received virtually no procedural protections and no judicial scrutiny of adequate

representation on direct review. The polar opposite is true here. If this final settlement can nonetheless be re-opened on a collateral attack such as that brought by respondents, class action settlements could hardly be called "settlements" at all.

CONCLUSION

For the foregoing reasons, the Second Circuit's judgment should be reversed.

Respectfully submitted,

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